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IN THE SUPERIOR COURT

STATE OF ARIZONA, COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	V1300CR201080049 **STATE'S RESPONSE TO DEFENDANT'S MOTION TO EXCLUDE IMPROPER EVIDENCE FROM PRE-SENTENCE HEARING** **(The Honorable Warren Darrow)**

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, hereby urges this Court to deny Defendant's "Motion to Exclude Improper Evidence from Pre-Sentence Hearing."

The legal authority cited by Defendant to support his argument that the State should be precluded from presenting evidence of additional aggravating factors at the pre-sentence hearing is inapplicable to non-capital cases. The statutes, the Arizona Rules of Criminal Procedure and applicable case law make it clear that the State may present such evidence at the upcoming pre-sentence hearing. Likewise, Defendant's attempt to preclude this Court from considering hearsay evidence that is reliable and relevant in order to show aggravating circumstances is unsupported by legal authority. As explained below, the statutes, the Arizona Rules of Criminal Procedure and case law all provide that this Court can consider "any reliable, relevant evidence, including

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hearsay," in determining additional aggravating circumstances applicable to its sentencing determination. *Rule 26.7(b), Ariz. R. Crim. P.*

This Response is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

A. A presentence hearing in a non-capital case is not limited to evidence of mitigation.

The purpose of a presentence hearing is to insure that the sentencing judge is fully informed as to the character of the individual to be sentenced and the circumstances of the crime. *State v. Ohta,* 114 Ariz. 489, 492, 562 P.2d 369, 372 (1977); *A.H. by Weiss v. Superior Court,* 184 Ariz. 627, 630, 911 P.2d 633, 636 (App. 1996). "The trial judge has wide discretion to review a variety of sources and types of information in determining the extent of punishment." *Id.* Indeed, Rule 26.7, Ariz. R. Crim. P., permits either party "to introduce any reliable, relevant evidence, including hearsay, in order to show aggravating or mitigating circumstances, to show why sentence should not be imposed, or to correct or amplify the pre-sentence, diagnostic or mental health reports."

Defendant's argument that the State cannot present evidence and information on additional aggravating factors for the Court's consideration at the pre-sentence hearing is in error and not supported by the law. The plain language of Arizona Revised Statutes § 13-701(F) and Rule 26.7, Ariz. R. Crim. P., allows the State to present such evidence and information following a jury finding of an aggravating circumstance.

Defendant erroneously cites to *State v. Hampton,* 213 Ariz. 167, 140 P.3d 950 (2006), and *State v. Pandeli,* 215 Ariz. 514, 161 P.3d 557 (2007), to support his argument that the State should be precluded from presenting evidence of aggravating circumstances at the upcoming presentence hearing, and may only present rebuttal evidence to Defendant's mitigation. Both

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Hampton and *Pandeli* were capital cases wherein a different set of rules and a different sentencing procedure applies. In a capital case following a determination of guilt, the case proceeds to a two-phase proceeding in front of the jury, the aggravation phase and the penalty phase, wherein the jury must determine whether to impose the death penalty. *Rule 19.1(c) and (d), Ariz. R. Crim. P., and A.R.S. § 13-752.* These were the procedures followed in *Hampton* and *Pandeli.* This is not a capital case and these procedures do not apply to the presentence hearing in this case.

In this case, the jury found the State had proven the aggravating circumstance of emotional harm to each of the victims' families beyond a reasonable doubt. This is a specifically enumerated aggravating circumstance set forth in A.R.S. § 13-702(D)(9).[1] Arizona Revised Statute § 13-701(F) provides that, "[i]f the trier of fact finds a least one aggravating circumstance, the trial court may find by a preponderance of the evidence additional aggravating circumstances." As a result of the jury's finding and pursuant to A.R.S. § 13-701(F), this Court may now "find and consider additional factors relevant to the imposition of a sentence up to the maximum prescribed in [A.R.S. § 13-702(D)]."[2] In *State v. Martinez,* 210 Ariz. 578, 585, 115 P.3d 618, 625 (2005), the Arizona Supreme Court makes it clear that "once a jury finds or a defendant admits a single aggravating factor, the Sixth Amendment permits the sentencing judge

[1] In addition to the emotional harm aggravator, the jury found as an additional aggravating circumstance that Defendant was in a unique position of trust with Lizbeth Neuman. This aggravating circumstance falls under the "catch-all" provision set forth in A.R.S. § 13-702(24) and is not a specifically enumerated aggravating circumstance.

[2] Because the jury found only one specifically enumerated aggravating circumstance, the law provides that Defendant may not be sentenced to the substantially aggravated term set forth in A.R.S. § 13-702 (D). See *State v. Perrin,* 222 Ariz. 375, 378, 214 P.3d 1016, 1019 (App. 2009) (Trial court required to find at leased two enumerated factors in order to impose a substantially aggravated sentence.)

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to find and consider additional factors relevant to the imposition of a sentence up to the maximum prescribed in that statute."

Although A.R.S. § 13-701(C)(24) provides that this Court can consider "any other factor that the state alleges is relevant to the defendant's character or to the nature or circumstances of the crime;" the use of the term "allege" does not limit the authority of the trial judge, *sua sponte,* to find only those aggravating circumstances formally alleged by the prosecution. *State v. Marquez,* 127 Ariz. 3, 5-6, 617 P.2d 787, 789-790 (1980). As long as the Court does not impose a sentence greater than that authorized by the jury's finding, this Court is free to consider "any reliable, relevant evidence, including hearsay," in determining additional aggravating circumstances applicable to its sentencing determination." *Rule 26.7(b), Ariz. R. Crim. P.*

B. The law permits the State to present reliable hearsay at the hearing.

As noted above, Rule 26.7, Ariz. R. Crim. P., permits either party, at the pre-sentence hearing, to introduce any reliable, relevant evidence, including hearsay, in order to show aggravating or mitigating circumstances. "What constitutes reliable or responsible hearsay is of necessity largely within the discretion of the trial court." *State v. Donahoe,* 118 Ariz. 37, 44, 574 P.2d 837 (1977). In *State v. Jones,* 147 Ariz. 353, 710 P.2d 463 (1985), the Arizona Supreme Court noted the following:

> "[I]nformation" includes only those facts which are substantiated. Unarticulated thoughts, unidentified documents, and unattributed statements do not provide "information" sufficient to support a finding of aggravated circumstances. "Evidence" to be admitted for sentencing purposes is, like other evidence, governed by the rules of evidence. "Information" may be considered even though it may not meet the requirements of the evidence rules. However, the rule of common sense applies even where the rules of evidence do not. The record must show what the information consists of and where it comes from and must indicate that it has some substance above rumor, gossip or speculation.

Id. at 355, 710 P.2d at 465.

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In this case, after the jury returned its guilty verdict, the State received numerous e-mails and letters from individuals personally affected by their relationship with Defendant. All of the e-mails and letters were immediately disclosed to Defendant. Detective Diskin has contacted the senders and verified that the e-mails or letters were in fact written by the identified authors and accurately represented their experience. None of the letters were sent anonymously and do not represent "unarticulated thoughts or unidentified documents." The letters have been formally disclosed along with Detective Diskin's supplemental report documenting his contact with the senders. While the State will call three of the writers to testify before this court, the State will move to admit the remainder through the testimony of Detective Diskin pursuant to Rule 26.7(b), Ariz. R. Crim. P.

Defendant writes in his Motion that he has never met three of the letter writers - Joshua Galle, Brooke Kirkland and Mary Latallade – and that they never attended a JRI event.

- The State agrees that this is true regarding Joshua Galle, who does not claim to have met Defendant and identifies himself as Lizbeth Neuman's nephew.
- The letter from Brooke Kirkland indicates she attended an event at the Seaside Church of Religious Science in 2007 where Defendant was the speaker. Detective Diskin will continue to try to contact her to verify this information.
- Mary Latallade attended Spiritual Warrior 2008 and there are photographs of her following the sweat lodge event in 2008. At the time, Ms. Latallade went by the name of Mary Bryson. Ms. Bryson's presence at Spiritual Warrior 2008 is also confirmed by Cynthia Manner's letter and multiple photographs admitted at trial.

Other than an e-mail identifying potential mitigation witnesses, the State has not received any disclosure from Defendant relating to the hearing; however, the State believes Defendant

will be submitting very similar communications favorable to Defendant to this Court for consideration.

In determining the appropriate sentence, "[t]he Court should take into account both the crime before it and the past conduct and moral character of the defendant so that the punishment may fit the offense and the offender." *State v. Gray,* 122 Ariz. 445, 448, 595 P.2d 990, 993 (1979); *State v. Shuler,* 162 Ariz. 19, 21, 780 P.2d 1067, 1069 (App. 1989). In making this determination, "the judge may consider any reliable, relevant evidence, including unsworn testimony and out-of-court statements." *State v. Johnson,* 131 Ariz. 299, 305, 640 P.2d 861, 867 (1982) (citing *State v. O'Donnal,* 110 Ariz. 552, 555, 521 P.2d 984, 987 (1974). Defendant's past conduct and moral character are relevant to the determination of an appropriate sentence and the letters and statements from past participants and clients of Defendant's events should be considered by this Court in weighing the evidence of mitigation and aggravation.

Defendant's Motion should be denied.

RESPECTFULLY submitted this 15 day of September, 2011.

By Steven D. Young, for
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YAVAPAI COUNTY ATTORNEY

COPIES of the foregoing emailed this 15th day of September, 2011:

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COPIES of the foregoing delivered this 15th day of September, 2011, to

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Via courthouse mailbox

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